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Constitutional Law: *MCI Telecommunications Corp. v. Public Service Commission*: The Tenth Circuit Rebuffs the Supreme Court Trend Supporting State Immunity

I. Introduction

In *MCI Telecommunications Corp. v. Public Service Commission*,¹ the Tenth Circuit Court of Appeals held that Eleventh Amendment immunity does not bar suits brought under the 1996 Telecommunications Act (TCA)² against states, state commissions, or individual state commissioners. In so holding, the Tenth Circuit joined a small but growing majority of circuit courts³ that have allowed telecommunications corporations to sue state commissions based on allegations that commission decisions interpreting or enforcing interconnection agreements⁴ violate the TCA. If allowed, such suits have the potential to directly impact not only the telecommunications industry, but also the general public. These suits could tie up state commission resources, including time and money spent on damage awards and litigation, and could prevent commissions from efficiently serving the public. At the same time, the suits could also protect ratepayers because the interconnection agreements often affect the prices consumers pay for services. This potential protection is especially significant because one of the primary purposes of the TCA is to promote competition, thereby reducing prices.

1. 216 F.3d 929 (10th Cir. 2000).

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

3. See *GTE N., Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000) (allowing a suit under the *Ex parte Young* doctrine); *Mich. Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862 (6th Cir. 2000) (holding the validity of the doctrine of implied waiver is questionable but allowing a suit under the *Ex parte Young* doctrine); *MCI Telecomm. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 328 (7th Cir. 2000) (holding a state waived immunity by regulating under the TCA and allowing a suit under the *Ex parte Young* doctrine). Since the Tenth Circuit decision, the Fifth Circuit has also joined this majority. *AT&T Communications v. BellSouth Telecomm., Inc.*, 238 F.3d 636 (5th Cir. 2001). Although the Sixth and Seventh Circuits beat the Tenth Circuit to the punch in declaring that states waive immunity by regulating under the TCA, the Tenth Circuit "is the leader . . . in being willing to find waivers of Eleventh Amendment immunity." Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 26 (2001); see also *Utah Sch. for the Deaf & Blind v. Sutton*, 173 F.3d 1226 (10th Cir. 1999) (holding Utah waived immunity by removing a case from state to federal court); *In re Innes*, 184 F.3d 1275 (10th Cir. 1999) (holding Kansas waived immunity by participating in a federal student loan program); *Martin v. Kansas*, 190 F.3d 1120 (10th Cir. 1999) (holding the Americans with Disabilities Act is a valid abrogation of state immunity because it is a valid exercise of Congress's Section Five power); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280 (10th Cir. 1999) (rejecting an argument that, under *Idaho v. Couer d'Alene*, 521 U.S. 261 (1997), special state interests precluded a suit under *Ex parte Young*).

4. Interconnection agreements are entered into by existing telecommunications providers and new entrants into telecommunications markets. See text accompanying *infra* note 17.

This note provides two theories in support of its contention that the majority of circuit courts is incorrect in holding that states have waived immunity by participating in the regulatory scheme provided by the TCA. First, this note argues that Congress did not expressly condition participation in the Act's regulatory scheme on states' waiver of immunity. Second, this note contends that even if waiver was a clear condition of participation in TCA regulation, any waiver by the states would be coerced and not voluntary. This is because the states' history of regulating the telecommunications industry transforms the ability to participate in the Act's regulatory scheme, which might otherwise be a gift, into a threat of sanction for failure to waive immunity.

Additionally, this note argues that although the applicability of the exception to Eleventh Amendment immunity recognized in *Ex parte Young*⁵ (allowing certain suits against individual state officials, including state commissioners, even where a state has not waived immunity) is difficult to determine, few courts have properly analyzed the issue in light of recent Supreme Court decisions. A proper analysis reveals that *Ex parte Young* is not applicable.⁶

Part II of this note provides the background information about the TCA and Eleventh Amendment immunity that is necessary to properly consider the Tenth Circuit ruling. Part II also discusses the origins of Eleventh Amendment immunity, recent Supreme Court decisions regarding the doctrine, and the circuit and district court decisions on immunity in the context of the TCA.⁷ Part III explores the Tenth Circuit decision and explains why sovereign immunity does in fact bar suits against states and commissions, but might not preclude actions under *Ex parte Young* for prospective relief against commissioners. Part III also examines issues that the Tenth Circuit failed to address in its decision. Finally, Parts IV and V discuss the

5. 209 U.S. 123, 161 (1908). In *Ex parte Young*, the Court recognized an exception to the "general rule" that a state could not be sued in court. *Id.* The Court held that state sovereign immunity would not bar a suit against a state officer when the plaintiff seeks prospective or declaratory relief from an ongoing violation of the Constitution or federal law. *See id.* at 161-68. For further explanation and a description of this doctrine see *infra* Part II.A.

6. *See MCI Telecomm.*, 216 F.3d at 939-40 (summarily disposing of the *Ex parte Young* issue); see also *infra* Part III.

7. The thrust and scope of the doctrine of Eleventh Amendment immunity is not clear. Cynthia L. Bauerly, *Balancing the Scales: The 1996 Telecommunications Act and Eleventh Amendment Immunity*, 50 FED. COMM. L.J. 399, 401 (1998) (stating that the "full effect of [Seminole Tribe] has yet to be seen"); Douglas C. Melcher, *State Sovereign Immunity and Judicial Review of Interconnection Agreements Under the Telecommunications Act of 1996*, 8 COMMLAW CONCEPTUS 61, 63-64 (2000); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 7 (1999) (stating that "the Court's state sovereign immunity jurisprudence is frequently convoluted, contradictory, and obscure"). This note will not attempt to examine the merits of the Eleventh Amendment and sovereign immunity doctrines as adopted and applied by the Court. Numerous articles, as well as various members of the Court, have examined the historical, constitutional, and common law basis for the immunity doctrines. *See, e.g.,* Young, *supra*, at 6 n.17 (collecting "[t]he essential literature" devoted to exploring the merits of the Court's immunity doctrine). This note will, however, attempt to explain the doctrines and apply existing decisions to determine whether immunity bars suits under the TCA. This note will also consider the existing case law and discuss the probable disposition of the issue by the Supreme Court.

Supreme Court's probable disposition of this issue and potential ramifications of this predicted disposition.⁸

II. Background on the TCA and the Immunity Doctrine

A. The History and Purpose of the TCA

In 1934, Congress passed the Communications Act, creating the Federal Communications Commission (FCC) and giving it the power to regulate interstate communications.⁹ This Act, however, left intrastate regulation to the individual states.¹⁰ In regulating intrastate phone service, states usually granted an exclusive franchise to a local exchange carrier that owned the local exchange network.¹¹ These local networks were comprised of switches, which directed calls to destinations, and wires, which connected these switches to each other and to telephones.¹²

8. In March 2001, the Supreme Court granted certiorari in two cases that are extremely relevant to this discussion. In *Mathias v. Worldcom Technologies, Inc.*, the Court agreed to consider the following jurisdictional and sovereign immunity issues: (1) whether a state commission's action enforcing an interconnection agreement that has been approved under § 252 is a "determination under section 252" for purposes of the federal jurisdiction granted by 47 U.S.C. § 252(e)(6); (2) whether a state commission waived Eleventh Amendment immunity by "accept[ing] Congress' invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court"; and (3) whether *Ex parte Young* suits are allowed under the TCA. *Mathias v. Worldcom Techs., Inc.*, 532 U.S. 903 (2001) (order granting certiorari). The Court also granted certiorari in *Verizon Maryland, Inc. v. Public Service Commission*, 121 S. Ct. 2548 (2001), and *United States v. Public Service Commission*, 121 S. Ct. 2548 (2001), on the issue of whether 28 U.S.C. § 1331 provides federal jurisdiction over suits under the TCA (as an alternative to jurisdiction under § 252(e)(6) regarding determinations). *Id.* These grants of certiorari would seem to put the Court in a position to resolve many of the issues discussed in this note. However, oral argument in *Mathias* revealed problems that the Justices felt could preclude them from reaching the merits of the immunity issues in that case. In a December 12, 2001, order, the Court extended its grant of certiorari in *Verizon* and *United States v. Public Service Commission*, to include the issues to which the Court granted certiorari in *Mathias*. *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 122 S. Ct. 679 (Dec. 12, 2001) (order extending grant of certiorari and request for briefs on additional issues). The Court did not specify the problematic issues but simply stated, "Oral argument has revealed, however, that we may be unable to reach the merits of the questions presented in *Mathias*." *Id.*; see also Supreme Court Transcript of Oral Argument, *Mathias*, No. 00-878, 2001 U.S. TRANS LEXIS 79 (Dec. 5, 2001) (including questions and discussion about the State's ability to appeal the issue of immunity barring jurisdiction where the State won below on the merits and therefore arguably suffered no harm). The order expanding the Court's review in *Verizon* and *United States v. Public Service Commission* may indicate a desire to reach the issue of immunity in the context of the TCA. However, because the Court did not specify the nature of the issues that could preclude it from reaching the merits in *Mathias*, it is unclear whether the Court will decide the immunity issues in *Verizon* and *United States v. Public Service Commission*.

9. William J. Quirk & Fred A. Walters, *A Constitutional and Statutory History of the Telecommunications Business in South Carolina*, 51 S.C. L. REV. 290, 310 (2000).

10. Michael L. Gallo, *AT&T Corp. v. Iowa Utilities Board*, 15 BERKELEY TECH. L.J. 417, 419 (2000); Quirk & Walters, *supra* note 9, at 314.

11. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); see also Michael Kerf & Damien Gardin, *Controlling Market Power in Telecommunications: Antitrust vs. Sector-Specific Regulation: An Assessment of the United States, New Zealand and Australian Experiences*, 14 BERKELEY TECH. L.J. 919, 936 (1999).

12. See *AT&T Corp.*, 525 U.S. at 371.

Over time, AT&T began to monopolize local telephone service.¹³ In 1982, however, potential competitors and the Department of Justice sued to divide the monopoly and obtained a decree ordering AT&T to dismantle.¹⁴ This decree fostered competition in the long-distance market, but technological advancements hindered competition in local service and it remained a monopoly.¹⁵

In 1996, Congress enacted the TCA to "promote competition and reduce regulation" in the local phone-service market and to provide customers with "lower prices and higher quality services."¹⁶ The TCA requires carriers that offer local service to negotiate interconnection agreements, which allow the sharing of existing networks, with new entrants to the local market.¹⁷ Carriers may privately reach such an agreement, but if private negotiations fail, either party may petition the state commission that regulates local phone service to arbitrate open issues.¹⁸

Any agreement, whether adopted through private negotiations or compulsory arbitration, must be submitted to the state commission for approval.¹⁹ The state commission must then either approve or reject the agreement.²⁰ A commission may reject a privately negotiated agreement if it discriminates against nonparty carriers or if it is inconsistent with the interests, conveniences, and needs of the public in that local market.²¹ However, a state commission may reject an arbitrated agreement only if it fails to meet the requirements or pricing standards set forth in the TCA.²² If a state commission does not approve or reject an agreement within the specified time periods, the agreement will be considered approved by the commission.²³

If a state commission "fails to act" under the TCA, the FCC will assume the commission's responsibility and preempt its jurisdiction over the proceeding.²⁴ This preemption provision may, at first blush, seem to afford the FCC broad power to preempt state regulation; however, the FCC has limited the situations in which it will preempt a state commission's authority by interpreting "fails to act" narrowly.²⁵

13. Kerf & Gardin, *supra* note 11, at 936.

14. STEVE COLL, *THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T* 76, 362 (1996).

15. *AT&T Corp.*, 525 U.S. at 371.

16. Pub. L. No. 104-104, 110 Stat. 56, 56 (1996) (statement of purpose).

17. *See AT&T Corp.*, 525 U.S. at 371; *see also* 47 U.S.C. § 251(c) (1996); *cf.* Kerf & Gardin, *supra* note 11, at 940-41.

18. 47 U.S.C. § 252 (1996).

19. *Id.* § 252(e)(1).

20. *Id.*

21. *Id.* § 252(e)(2).

22. *Id.*

23. *Id.* § 252(e)(4).

24. *Id.* § 252(e)(5); *cf. In re Starpower Communications*, 15 F.C.C.R. 11,277, ¶ 5 (2000) (preempting a state commission's jurisdiction for failure to act).

25. *See In re Petition of MCI*, 12 F.C.C.R. 15,594, ¶ 7 (1997) (noting the FCC's decision not to "take an expansive view" of what constitutes failure to act); 47 C.F.R. § 51.801(b) (2000) (defining "failure to act" as a failure to respond within a reasonable time to a request for arbitration or a failure to complete an arbitration within the time limits provided in the statute); *cf. In re Am. Communications Servs., Inc.*, 14 F.C.C.R. 21,579 (1999) (declining to preempt because the request did not allege a failure to act regarding a specific proceeding).

The FCC has determined that a state commission "fails to act" when it does not respond to a request for mediation or arbitration within a reasonable time, when it fails to complete arbitration of an interconnection agreement within the time specified by the TCA, or when it expressly declines to resolve a petition.²⁶ The FCC has only found preemption to be proper in these circumstances.²⁷

B. The Origins of Eleventh Amendment and Sovereign Immunity

The judicial concept of state immunity began as a controversial topic and that controversy has not lost its fire in recent years.²⁸ In *Chisholm v. Georgia*,²⁹ the Supreme Court allowed a South Carolina citizen to sue the State of Georgia in federal court for breach of contract. The Court held that Article III provided it with jurisdiction over "[c]ontroversies . . . between a State and Citizens of another State" and that section 13 of the 1789 Judiciary Act provided it with original jurisdiction over controversies "between a state and citizens of other states."³⁰ Approximately three weeks after the Court's decision in *Chisholm*, Congress passed the Eleventh Amendment.³¹ It provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."³²

On its face, the Eleventh Amendment only restricts jurisdiction over suits against a state by citizens of a different state; however, the Supreme Court, in *Hans v. Louisiana*,³³ expanded this immunity to include suits against states by their own citizens. In *Hans*, the Court held that the Eleventh Amendment did not create immunity, but merely overruled *Chisholm*, which had erroneously abrogated an already existing state sovereign immunity.³⁴ Additionally, the Court in *Hans* held that the Eleventh Amendment "constitutionalized" sovereign immunity — that is, placed it within the protections of a constitutional doctrine.³⁵ Although some members of the Court³⁶ and various commentators³⁷ have continued to question

26. See 47 C.F.R. § 51.801(b) (2000).

27. See *Starpower Communications*, 15 F.C.C.R. at 11,277, ¶ 7.

28. See *supra* note 7; *infra* notes 36-37. Although the concept first appeared in case law in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), it existed in the minds of at least some individuals long before *Chisholm*. This is illustrated by statements made during debates about the ratification of the Constitution indicating that, under the Constitution, the states would retain their immunity. THE FEDERALIST NO. 81 (Alexander Hamilton); see also Jake C. Blavat, Note, Wisconsin Bell v. Public Service Commission of Wisconsin: Problems in the Telecommunications Act in the New Age of Sovereign Immunity, 2000 WIS. L. REV. 1149, 1155 (giving background information about the sovereign immunity doctrine).

29. 2 U.S. (2 Dall.) 419 (1793).

30. *Id.*; see also PETER W. LOW & JOHN C. JEFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 809 (4th ed. 1998).

31. LOW & JEFRIES, *supra* note 30, at 809.

32. U.S. CONST. amend XI.

33. 134 U.S. 1, 10-11 (1890).

34. See *id.*; see also LOW & JEFRIES, *supra* note 30, at 813; Young, *supra* note 7, at 12 (stating that the Court noted in *Seminole Tribe* that the doctrine recognized in *Hans* was "of constitutional stature").

35. *Hans*, 134 U.S. at 16; see also LOW & JEFRIES, *supra* note 30, at 813-14.

36. See *Seminole Tribe v. Florida*, 517 U.S. 44, 117 (1996) (Souter, J., dissenting) (arguing that the

the merits of the decision in *Hans*, a majority of the Court has repeatedly reaffirmed the constitutional doctrine of immunity espoused therein.³⁸ Additionally, over the last five years, the Court has relied on *Hans* to bar suits against states in their own courts,³⁹ restrict Congress's ability to abrogate immunity,⁴⁰ limit the doctrine of constructive waiver,⁴¹ and limit the applicability of the exception for prospective relief recognized in *Ex parte Young*.⁴²

The exact nature and scope of state immunity is unclear,⁴³ but the Court's recent decisions have recognized a well-established concept that states are immune from suit in federal and state courts. Despite this general acceptance of state immunity, the Court has recognized three situations in which immunity does *not* prevent a suit from proceeding. First, a state may voluntarily waive its immunity, although it is not clear whether waiver must be express or can also be constructive.⁴⁴ Second, Congress can abrogate immunity pursuant to a valid exercise of its Fourteenth Amendment power.⁴⁵ Third, in *Ex parte Young*, the Court held that immunity does not bar a suit for prospective or declaratory relief from an ongoing violation of the Constitution or federal law by a state official.⁴⁶ These exceptions have recently come under fire in several decisions, and the Supreme Court has limited their scope.⁴⁷ The Court's recent decisions raise questions about the applicability of the exceptions in suits brought under a number of statutes, including the TCA.⁴⁸

C. Recent Decisions Limiting the Exceptions to Immunity

Many commentators have dubbed *Seminole Tribe v. Florida*⁴⁹ as the beginning of the Court's expansion of the state immunity doctrine.⁵⁰ In *Seminole Tribe*, the

majority's expansion of *Hans* "compounds and immensely magnifies the century-old mistake of *Hans* itself"; cf. *Alden v. Maine*, 527 U.S. 706, 790 (1999) (Souter, J., dissenting) (discounting the majority's reliance on *Hans*).

37. See James E. Pfander, *History and State Suability: An Explanatory Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1274-80 (1997) ("attempt[ing] to revive the revisionist enterprise" to "cabin the influence of this spurious principle of sovereign immunity"); Young, *supra* note 7, at 7-8 (discussing various theories advanced to explain the meaning of the Eleventh Amendment); see also LOW & JEFRIES, *supra* note 30, at 814.

38. E.g., *Seminole Tribe*, 517 U.S. at 69-70.

39. *Alden*, 527 U.S. at 723, 727-30.

40. *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 690 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 635 (1999).

41. *College Sav. Bank*, 527 U.S. at 690.

42. *Seminole Tribe*, 517 U.S. at 54.

43. See *supra* note 7 (discussing the ambiguity of the sovereign immunity doctrine).

44. E.g., *College Sav. Bank*, 527 U.S. at 690.

45. E.g., *Seminole Tribe*, 517 U.S. at 55-56.

46. E.g., *College Sav. Bank*, 527 U.S. at 690; *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 636-37 (1999); *Ex parte Young*, 209 U.S. 123, 161-68 (1908).

47. See Bauerly, *supra* note 7, at 405-11.

48. See *id.* at 413.

49. 517 U.S. 44 (1996).

50. See Bernard Schwartz, *Federalism, Administrative Law, and the Rehnquist Court in Action*, 32 TULSA L.J. 477, 477 (1997); cf. Chemerinsky, *supra* note 3, at 18 (noting the "dramatic expansion of the scope of state sovereign immunity" during the Rehnquist Court).

Court held that the Indian Gaming Regulatory Act (IGRA), which allowed tribes to sue states in federal court, was not a valid abrogation of Eleventh Amendment immunity.⁵¹ The Court overruled *Pennsylvania v. Union Gas Co.*,⁵² and held that the only method by which Congress can validly abrogate immunity is through an exercise of its Fourteenth Amendment powers.⁵³ Because Congress enacted the IGRA pursuant to its Article I powers, the Court held that the attempted abrogation was invalid.⁵⁴

The Court also denied relief under the *Ex parte Young* doctrine. The Court reasoned that by including a specific remedial scheme in the IGRA, Congress evidenced its intent that *Ex parte Young* remedies should not be available.⁵⁵ Accordingly, the Court held that the State's immunity precluded suits brought against it under the IGRA.⁵⁶ Although *Seminole Tribe* limits the applicability of *Ex parte Young* in some situations, the Court did not specify the level of detail and intricacy Congress must include in a remedial scheme to evidence its intent to render *Ex parte Young* relief unavailable.⁵⁷

In *Idaho v. Coeur d'Alene Tribe*,⁵⁸ the Court considered whether a state was immune from a suit brought by a sovereign Indian tribe.⁵⁹ The Court held that because members of the Constitutional Convention did not intend for Indian tribes to sacrifice their immunity as to the states, the states were also not expected to relinquish their immunity with respect to the tribes.⁶⁰ More important for purposes of immunity and the TCA, the Court reasoned that while *Ex parte Young* should apply in most cases, it should not be interpreted to permit an action in federal court in every instance.⁶¹ Automatically applying *Ex parte Young* to afford relief in every case, the Court reasoned, would be "to adhere to an empty formalism and undermine the principle" that Eleventh Amendment immunity operates as a "real limitation" on a federal court's jurisdiction.⁶²

The Court recognized that in applying *Ex parte Young*, it must balance the need to protect state sovereignty with the need to prevent violations of federal law.⁶³ The Court noted that *Ex parte Young* has valuable application when no state forum exists and when the case calls for interpretation of federal law.⁶⁴ However, the

51. *Seminole Tribe*, 517 U.S. at 47.

52. 491 U.S. 1 (1989).

53. *Seminole Tribe*, 517 U.S. at 72-73.

54. *Id.*

55. *Id.* at 74-75.

56. *Id.*

57. William E. Thro, *The Education Lawyer's Guide to the Sovereign Immunity Revolution*, 146 WEST'S EDUC. L. RPTR. 951, 966-67 (2000); see also Bauerly, *supra* note 7, at 401. This argument will be discussed in more detail in Part IV.

58. 521 U.S. 261 (1997).

59. *Id.* at 269.

60. *Id.*

61. *Id.* at 270, 277.

62. *Id.*

63. *Id.* at 269.

64. *Id.* at 272-74.

Court also acknowledged that a state has an important interest in administering "proper judicial control of state officials," which might be implicated when a party attempts to invoke federal law to challenge state administrative proceedings.⁶⁵

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,⁶⁶ the Court held that Florida did not waive its Eleventh Amendment immunity by participating in a tuition prepayment program.⁶⁷ The Court overruled the constructive waiver doctrine established in *Parden v. Terminal Railway*,⁶⁸ stating that it could not "square *Parden* with cases requiring that a State's express waiver of sovereign immunity be unequivocal."⁶⁹ However, it is unclear whether some form of the constructive waiver concept survived *College Savings Bank*. This ambiguity stems from the Court's acknowledgment that a state could waive its immunity in exchange for a federal grant or gratuity to which it would not otherwise be entitled.⁷⁰ Thus, the pivotal issue in determining whether a state has waived immunity seems to be whether it is acting or regulating in an area in which it is *entitled* to participate or whether it is acting in an area in which Congress must *allow* it to participate.⁷¹

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,⁷² a companion case to *College Savings Bank*, the Court held the Patent Remedy Act was not a valid abrogation of state immunity because Congress passed the Act pursuant to its Article I powers, rather than its Fourteenth Amendment authority.⁷³ The Court noted that *College Savings Bank* "foreclosed" the argument that Florida constructively waived its immunity.⁷⁴ However, this statement by the Court does not clarify the questions surrounding the viability of constructive waiver because the subject matter in *Florida Prepaid* and *College Savings Bank* was identical. Accordingly, the Court had already decided that, in the factual context of *Florida Prepaid* and *College Savings Bank*, Florida had not constructively waived its immunity. Thus, constructive waiver may continue to be a valid exception to sovereign immunity under other facts. On the other hand, another reading of the Court's statement is that *College Savings Bank* abolished the doctrine of constructive waiver and that any waiver must now be express.

65. *Id.* at 275-77.

66. 527 U.S. 666 (1999).

67. *Id.* at 691.

68. 377 U.S. 184 (1964).

69. *College Sav. Bank*, 527 U.S. at 680-81 (citing *Great N. Life Ins. Co. v. Read*, 322 U.S. 47 (1944)).

70. *See id.* at 688.

71. A state could also waive its immunity in exchange for a more tangible gratuity, such as federal funds.

72. 527 U.S. 627 (1999).

73. *Id.* at 635-36.

74. *Id.* at 635.

D. The Circuit and District Court Splits on Immunity and the TCA

The Court's recent decisions have changed the boundaries of the sovereign immunity doctrine and limited the applicability of the exceptions.⁷⁵ The lack of clarity as to the proper application of the doctrine and its exceptions⁷⁶ has led to splits in district and circuit courts attempting to apply the doctrine to suits brought under the TCA.⁷⁷ To date, the Fourth, Fifth, Sixth, Seventh, and Tenth Circuit Courts of Appeals have addressed the effect of state immunity within the specific context of the TCA.⁷⁸ All but the Fourth Circuit have allowed suits against individual commissioners under the *Ex parte Young* doctrine.⁷⁹ However, the

75. See Bauerly, *supra* note 7, at 404-405; cf. Chmerinsky, *supra* note 3, at 20-29.

76. See Chavez v. Arte Publico Press, 204 F.3d 601, 604 (5th Cir. 2000) (noting that a previous Fifth Circuit holding that implied waiver is no longer viable after *Seminole Tribe*); GTE N., Inc. v. Strand, 209 F.3d 909, 922 n.6 (6th Cir. 2000) (stating "the waiver doctrine no longer provides a reliable basis for seeking relief against state commissions"); cf. Oliver B. Rutherford, *Don't Waive the White Flag Just Yet: Justice Kennedy's Concurring Opinion in Wisconsin Department of Corrections v. Schacht Breathes Life into Eleventh Amendment Waiver*, 38 BRANDEIS L.J. 581, 589-90 (1997) (noting the Court's disfavor of constructive waiver prior to *Seminole Tribe*).

77. Compare Bell Atl.-Pa., Inc. v. Pa. Pub. Util. Comm'n, 107 F. Supp. 2d 653, 662-64 (E.D. Pa. 2000) (holding that a state had waived immunity and that *Ex parte Young* would allow a suit against the individual commissioners), and Bell Atl.-Del., Inc. v. McMahon, 80 F. Supp. 2d 218, 233-34 (D. Del. 2000) (same), and AT&T v. Southwestern Bell, 86 F. Supp. 2d 932, 946-47 (W.D. Mo. 1999) (same), *rev'd*, 236 F.3d 922 (8th Cir. 2001), and US W. Communications, Inc. v. Meacham, Nos. 2:98CV-490K and 2:98CV-488K, 1999 U.S. Dist. LEXIS 22003, at *7-*9 (D. Utah. Aug. 13, 1999) (same), and Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc., 16 F. Supp. 2d 817, 825-26 (W.D. Mich. 1998) (same), and Ind. Bell Tel. Co. v. McCarty, 30 F. Supp. 2d 1100, 1106 (S.D. Ind. 1998) (same), with BellSouth Telecomm., Inc. v. MCI Metro Access, 97 F. Supp. 2d 1363, 1374 (N.D. Ga. 2000) (holding that a state did not waive its immunity and that *Ex parte Young* did not apply to allow suits against commissioners), *rev'd on other grounds*, Nos. 00-12809 and 00-12810, 2002 U.S. App. LEXIS 373 (11th Cir. Jan. 10, 2002), and Wis. Bell, Inc. v. Pub. Serv. Comm'n, 57 F. Supp. 2d 710, 714-15 (W.D. Wis. 1999) (same), *aff'd*, 222 F.3d 323 (7th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001), and AT&T Communications of the S. Cent. States, Inc. v. BellSouth Telecomm., Inc., 43 F. Supp. 2d 593, 601-603 (M.D. La. 1999) (same), *rev'd*, 238 F.3d 636 (5th Cir. 2001), and Bell Atl.-Md., Inc. v. MFS Intelenet of Md., Inc., No. S99-2061, 1999 U.S. Dist. LEXIS 16477, at *10, *19 (D. Md. Oct. 20, 1999) (same).

78. The Fourth and Fifth Circuits issued opinions after the completion of the bulk of the research for this note. Accordingly, they are not discussed in depth. However, since the Fourth Circuit is the only circuit court to hold that *Ex parte Young* does not apply to allow suits against individual commissioners, I have attempted to incorporate it to the extent possible. The Fifth Circuit opinion simply followed the Sixth, Seventh, and Tenth Circuits and does not add substantially to the discussion. AT&T Communications v. BellSouth Telecomm. Inc., 238 F.3d 636, 647 (5th Cir. 2001) (holding the State waived immunity by regulating under the TCA and "agree[ing] with the Sixth, Seventh, and Tenth Circuits that such a suit . . . is a 'straight forward' *Ex parte Young* case").

79. Compare AT&T Communications v. BellSouth Telecomm. Inc., 238 F.3d 636 (5th Cir. 2001) (holding *Ex parte Young* allows suits against individual commissioners under the TCA), and GTE N., Inc. v. Strand, 209 F.3d 909 (6th Cir. 2000) (same), and Mich. Bell Tel. Co. v. Climax Tel. Co., 202 F.3d 862 (6th Cir. 2000), and MCI Telecomm. Corp. v. Ill. Bell Tel. Co., 222 F.3d 323, 328 (7th Cir. 2000) (same), and MCI Telecomm. Corp. v. Pub. Serv. Comm'n, 216 F.3d 929, 938 (10th Cir. 2000) (same), with Bell Atl. Md., Inc. v. MCI Worldcom, Inc., 240 F.3d 279 (4th Cir. 2001), *cert. granted sub nom. Verizon Md., Inc. v. Pub. Serv. Comm'n*, 121 S. Ct. 2548 (2001) (holding a state does not waive its immunity by regulating under the TCA).

circuit courts have reached different conclusions on the issue of whether states have constructively waived immunity by arbitrating and approving agreements under the TCA.⁸⁰ The theory on which courts rely in allowing suits is crucial because *Ex parte Young* only applies to allow prospective or declaratory relief,⁸¹ so a plaintiff's remedies in a suit allowed under the *Ex parte Young* doctrine are more limited than the remedies available if a state waives its immunity.⁸² Also, the importance of analyzing the applicability of both the *Ex parte Young* doctrine and the constructive waiver doctrine is increased by the questions surrounding the viability of the constructive waiver doctrine.⁸³ If *Ex parte Young* does not apply and constructive waiver is no longer a viable exception to sovereign immunity, relief in federal court may be completely unavailable under the current version of the TCA.⁸⁴

The Fourth and Sixth Circuits are the only circuits to date to hold that a state has not waived its immunity by regulating under the TCA. In so holding, the Sixth Circuit noted that the doctrine of constructive waiver "no longer provides a reliable basis for seeking relief against state commissions."⁸⁵ However, the Sixth Circuit has, in at least three cases, held that the *Ex parte Young* doctrine applies to allow suits seeking prospective or declaratory relief against individual commissioners.⁸⁶ The Fifth, Seventh, and Tenth Circuits, by contrast, have relied on constructive waiver to allow suits and have held that a state constructively waives its sovereign

80. Compare *MCI Telecomm. Corp.*, 222 F.3d at 345 (holding states have waived immunity), and *MCI Telecomm.*, 216 F.3d at 938 (same), with *Bell Atl. Md.*, 240 F.3d at 293, 309 (holding "Congress did not clearly manifest an intent" to condition state regulation under the TCA on waiver of sovereign immunity), and *GTE N., Inc.*, 209 F.3d at 909 n.6 (holding "it is virtually certain that a state utility commission's decision to accept regulatory authority under the [TCA] cannot legitimately be construed as a valid waiver of sovereign immunity").

81. See Gordon L. Henrick, *Roving Federalism: Waiver Doctrine After College Savings Bank v. Florida Prepaid Postsecondary Education Board*, 49 EMORY L.J. 859, 865 n.33 (1998).

82. See *id.*

83. See *supra* note 7 (discussing the questions surrounding the constructive waiver doctrine). For an argument that the "gratuity" exception is misapplied in the context of the TCA because states are not constitutionally prohibited from regulating local telephone service, see Recent Case, *Constitutional Law — State Sovereign Immunity — Seventh Circuit Holds that States Waive Sovereign Immunity by Arbitrating Interconnection Agreements Under the Telecommunications Act of 1996 — MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 114 HARV. L. REV. 1819 (2001).

84. Arguably, Congress could change this result by requiring the FCC, instead of state commissions, to oversee and interpret interconnection agreements. Blavat, *supra* note 28, at 1180-81. Additionally, this lack of a federal forum is limited to suits against states. If states are not necessary parties, suits between telecommunications providers could likely be brought in federal court. See *id.* at 1174-83 (discussing possible solutions to the lack of a federal forum, including the possibility that states are not necessary parties to interconnection-agreement disputes).

85. *Telespectrum, Inc. v. Pub. Serv. Comm'n*, 227 F.3d 414 (6th Cir. 2000) (applying only the *Ex parte Young* doctrine to allow a suit against the commissioners); see also *GTE N., Inc.*, 209 F.3d at 922 n.6 (holding that *Florida Prepaid* and *College Savings Bank* undermine earlier circuit decisions that held that state utility commissions waive immunity by regulating under the TCA); *Mich. Bell Tel. Co.*, 202 F.3d at 867 (expressly noting that it did not base its decision on the Seventh Circuit's *MCI Telecommunications Corp.* because *College Savings Bank* limited the constructive waiver doctrine).

86. *Telespectrum, Inc.*, 227 F.3d at 416 (allowing suits under *Ex parte Young*); *GTE N., Inc.*, 209 F.3d at 922 (same); *Mich. Bell Tel. Co.*, 202 F.3d at 867 (same).

immunity by participating in the regulatory scheme provided for in the TCA.⁸⁷ These courts have also held that *Ex parte Young* applies to allow prospective relief against individual commissioners.⁸⁸

Although a majority of the federal district courts faced with the issue has applied the constructive waiver and *Ex parte Young* doctrines to allow suits against states, state commissions, and commissioners,⁸⁹ a substantial minority has held otherwise.⁹⁰ The circuit and district courts finding no waiver have noted that the states regulated intrastate telecommunications for more than a century.⁹¹ These courts have also held that because the TCA simply allows states to continue regulation of an important local industry, participating in the scheme does not constitute a voluntary waiver in exchange for a gratuity or gift.⁹² In finding that immunity bars suits under the TCA, these courts have recognized the Supreme Court's recent cases limiting the constructive waiver and *Ex parte Young* exceptions.⁹³

The courts finding waiver, however, have relied heavily on the notion that Congress could preempt all state regulation of intrastate telecommunications. Thus, they argue, any opportunity to regulate local markets should be considered a gift from Congress, which is exchanged for a state's waiver of its sovereign immunity.⁹⁴

87. *MCI Telecomm. Corp. v. Ill. Tel. Co.*, 222 F.3d 323, 342 (7th Cir. 2000) (distinguishing *Alden*, *College Savings*, and *Florida Prepaid* to hold states had waived immunity by "accepting the federal government's invitation to act as regulators of the local telephone market"); *MCI Telecomm. Corp. v. Pub. Serv. Comm'n*, 216 F.3d 929, 938-39 (10th Cir. 2000) (holding a state waived its immunity in exchange for the opportunity to participate in TCA regulation, which was a gift from Congress); *supra* note 78.

88. *MCI Telecomm. Corp.*, 222 F.3d at 342; *MCI Telecomm.*, 216 F.3d at 939-40.

89. See *Bell Atl.-Pa., Inc. v. Pa. Pub. Util. Comm'n*, 107 F. Supp. 2d 653, 662-64 (E.D. Pa. 2000) (holding states waived immunity and *Ex parte Young* would allow suit against commissioners); *Bell Atl.-Del., Inc. v. McMahon*, 80 F. Supp. 2d 218, 233-34 (D. Del. 2000) (same); *AT&T v. Southwestern Bell*, 86 F. Supp. 2d 932, 946-47 (W.D. Mo. 1999) (same); *US W. Communications, Inc. v. Meacham*, Nos. 2:98CV-490K and 2:98CV-488K, 1999 U.S. Dist. LEXIS 22003, at *7-*9 (D. Utah Aug. 13, 1999) (same); *Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 16 F. Supp. 2d 817, 825-26 (W.D. Mich. 1998) (same); *Ind. Bell Tel. Co. v. McCarty*, 30 F. Supp. 2d 1100, 1106 (S.D. Ind. 1998) (same).

90. See *Bell Atl. Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 294-98 (4th Cir. 2001) (holding *Ex parte Young* does not apply to allow suits under the TCA because it would frustrate Congress's intent to limit review of state commission decisions and questioning whether the commissioners' actions would be an ongoing violation of federal law); *Bellsouth Telecomm., Inc. v. MCI Metro Access*, 97 F. Supp. 2d 1363, 1374 (N.D. Ga. 2000) (holding a state does not waive its immunity and *Ex parte Young* does not apply), *rev'd on other grounds*, Nos. 00-12809 and 00-12810, 2002 U.S. App. LEXIS 373 (11th Cir. Jan. 10, 2002); *Wis. Bell, Inc. v. Pub. Serv. Comm'n*, 57 F. Supp. 2d 710, 714-15 (W.D. Wis. 1999) (same); *AT&T Communications of S. Cent. States, Inc. v. BellSouth Telecomm., Inc.*, 43 F. Supp. 2d 593, 601-03 (M.D. La. 1999) (same); *Bell Atl.-Md., Inc. v. MFS Intelenet of Md., Inc.*, No. S99-2061, 1999 U.S. Dist. LEXIS 16477, at *10, *19 (D. Md. Oct. 20, 1999) (same).

91. *Telespectrum, Inc. v. Pub. Serv. Comm'n*, 227 F.3d 414 (6th Cir. 2000); *GTE N., Inc.*, 209 F.3d at 922 n.6; *Mich. Bell Tel. Co.*, 202 F.3d at 867; see also *supra* note 90 (collecting district court cases that have decided the issue).

92. *Bellsouth Telecomm., Inc.*, 97 F. Supp. 2d at 1371-72; *AT&T Communications of S. Cent. States*, 43 F. Supp. 2d at 602.

93. See *supra* notes 90-92 (collecting circuit and district court cases).

94. *MCI Telecomm. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 342 (7th Cir. 2000); *MCI Telecomm. Corp. v. Pub. Serv. Comm'n*, 216 F.3d 929, 938-39 (10th Cir. 2000); see also *supra* note 89 (collecting

In applying *Ex parte Young* to afford relief, these courts have pointed to the differences between the remedial scheme provided in the IGRA and the scheme found in the TCA to hold that *Seminole Tribe* does not preclude the application of *Ex parte Young* to suits under the TCA.⁹⁵

III. The Tenth Circuit Opinion

In *MCI Telecommunications Corp. v. Public Service Commission*, AT&T Communications of the Mountain States, Inc. (AT&T), MCI Metro Access Transmission Services, Inc., and MCI Telecommunications Corp. (MCI collectively) sought arbitration from the Utah Public Service Commission (UPSC).⁹⁶ The companies petitioned the UPSC for arbitration of their agreements with US West Telecommunications, Inc. (US West), pursuant to the TCA.⁹⁷ The UPSC consolidated the arbitration petitions, and issued an order resolving a number of questions and directing the parties to file revised agreements with the UPSC.⁹⁸ The UPSC later reviewed and approved the revised interconnection agreements.⁹⁹

Following the approval of the agreements, US West filed suit in federal court against AT&T, MCI, the individual commissioners, and the UPSC. US West challenged certain provisions of its agreements with AT&T and MCI, raised a takings claim, and sought declaratory and injunctive relief to prevent the commission from future enforcement of the agreements.¹⁰⁰ MCI filed suit against US West, the individual commissioners, and the UPSC.¹⁰¹ The district court consolidated the cases, and the commissioners and the UPSC filed a motion to dismiss, claiming immunity under the Eleventh Amendment.¹⁰² The district court denied the motion, and the Tenth Circuit upheld that denial.¹⁰³

In affirming the denial of the motion to dismiss, the Tenth Circuit held that the State of Utah waived its immunity by participating in the regulatory scheme provided by the TCA.¹⁰⁴ The court also held that *Ex parte Young* applied to allow a suit against the individual commissioners.¹⁰⁵ In reaching this conclusion, the Tenth Circuit recognized three limitations on sovereign immunity: (1) proper abrogation by Congress, (2) waiver by a state, and (3) the exception recognized in

district court cases).

95. *MCI Telecomm. Corp.*, 222 F.3d at 342; *MCI Telecomm.*, 216 F.3d at 938-39.

96. *MCI Telecomm.*, 216 F.3d at 934.

97. *Id.*; see also 47 U.S.C. § 252(b) (1994) (allowing carriers to petition a state commission for arbitration where private negotiations fail).

98. *MCI Telecomm.*, 216 F.3d at 934.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* The UPSC's motion also challenged the district court's jurisdiction of the takings claim.

Id.

103. *Id.*

104. *Id.* at 938-39.

105. *Id.* at 939-40.

Ex parte Young.¹⁰⁶ The court noted that Utah had clearly not expressly waived immunity by state statute or constitutional provision.¹⁰⁷ The court also recognized that any attempted abrogation under the TCA would be invalid because the Act was passed pursuant to Congress's Article I powers and not its Fourteenth Amendment powers.¹⁰⁸ Accordingly, the court focused on two issues: first, whether the State had "impliedly or constructively" waived its immunity and second, whether *Ex parte Young* would allow relief in the absence of a waiver.¹⁰⁹

The court applied a two-part test to determine whether the State had waived its immunity.¹¹⁰ First, the court considered *College Savings Bank* to determine whether Congress had conditioned the receipt of a gift or gratuity on the State's consent to suit in federal court.¹¹¹ The court distinguished *Parden* and *College Savings Bank*, relying heavily on Congress's ability to entirely preempt state regulation of private utilities and holding that the opportunity to regulate local phone service was a gratuity for which Utah had voluntarily waived its immunity.¹¹² Second, the court determined whether the waiver was "altogether voluntary," rather than forced or coerced by Congress.¹¹³ The court noted that Congress may not "threaten[] a state with a sanction if it refuses to consent" because that would render any waiver involuntary.¹¹⁴ The court also recognized that "it may be that the difference between a gift and a sanction disappears when the gift Congress threatens to withhold is large enough."¹¹⁵ However, the court did not discuss whether the importance of continued regulation of intrastate phone markets and the states' historical regulation of that area rendered any attempt to condition participation on waiver coercive. Instead, the court merely stated, without explanation, that the waiver was not coerced because Congress "remove[d] only a slice of regulatory authority" from the states.¹¹⁶

In holding that *Ex parte Young* allows a suit against the individual commissioners, the court stated that "it was a straightforward *Ex parte Young* case." Accordingly, the court simply adopted the holding and reasoning of the Sixth

106. *Id.* at 935.

107. *Id.* at 935-36.

108. *Id.* at 935 n.3. It is unclear from the opinion whether MCI and US West vigorously argued that Congress had abrogated state immunity under the TCA; however, the court's analysis of potential abrogation was limited to this footnote. The court stated that the district court "mention[ed] abrogation in passing, and on appeal defendants briefly argue[d] that Congress could not have constitutionally abrogated state sovereign immunity through passage of the [TCA]." *Id.*

109. *See id.* at 935. The court cited *College Savings Bank*, noting it had overruled *Parden*'s constructive waiver doctrine, but claiming it also recognized that a state could still constructively waive immunity. *Id.* The court also relied on *In re Innes*, 184 F.3d 1275 (10th Cir. 1999), an earlier Tenth Circuit opinion in which the court stated that constructive waiver survived *College Savings Bank*. *MCI Telecomm.*, 216 F.3d at 935-36 (citing *Innes*).

110. *See id.* at 936-37.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 938-39 n.6.

Circuit in *Michigan Bell Telephone Co. v. Climax Telephone Co.*¹¹⁷ In adopting this reasoning, the court held that US West sought prospective equitable relief because it asked the district court to enjoin future enforcement of the agreement.¹¹⁸ The court did consider a matter not addressed by the Sixth Circuit when it recognized the need to examine whether, under *Coeur d'Alene Tribe*, the requested relief "implicate[d] special sovereignty interests" and was "the functional equivalent" of relief that would otherwise be barred by the Eleventh Amendment.¹¹⁹ However, the Tenth Circuit held that the requested relief would remedy the commission's actions that allegedly violated the TCA and that such relief would not "affect any special sovereignty interests or otherwise cause offense to Utah's sovereign authority."¹²⁰ Additionally, although the court did not specifically address why the remedial scheme provided by the TCA was not sufficiently complex to preclude *Ex parte Young* relief under *Seminole Tribe*, it cited *Alden* as reaffirming the viability of the *Ex parte Young* doctrine.¹²¹

IV. Will the Tenth Circuit Opinion Survive Supreme Court Review?

Upon consideration, the Supreme Court will likely hold that states have not voluntarily waived immunity by participating in the regulatory scheme provided by the TCA. There are a number of factors supporting this conclusion, including the questionable viability of constructive waiver, the Court's recent support of state immunity, and the limitations on the exceptions to immunity.¹²² Additionally, the essential nature of the states' ability to regulate local telecommunications markets and the history of state regulation might persuade the Court that the TCA provides a threat of sanction, rather than a gift or gratuity contingent on waiver.¹²³

117. *Id.* at 939 (adopting the rationale and holding of the Sixth Circuit in *Mich. Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000)).

118. *Id.*

119. *Id.* at 940 n.8.

120. *Id.* (addressing claims that Idaho v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997), prevents the application of *Ex parte Young* because it prevents recovery of relief that would otherwise be barred by the Eleventh Amendment).

121. *See id.* at 939-40. Although the court in *Michigan Bell* did not address the possibility that the remedial scheme included in the TCA was detailed so as to preclude *Ex parte Young* relief under *Seminole Tribe*, the Sixth Circuit did analyze such a claim in a later case. *See Telespectrum, Inc. v. Pub. Serv. Comm'n*, 227 F.3d 414, 420-21 (6th Cir. 2000). In *Telespectrum*, the court distinguished *Seminole Tribe* and held the scheme was not sufficiently intricate or detailed as to fall within the exception to *Ex parte Young*. *Id. But see Bell Atl. Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 294-98 (4th Cir. 2001); *BellSouth Telecomm., Inc. v. MCI Metro Access Transmission Serv., Inc.*, 97 F. Supp. 2d 1363, 1373 (N.D. Ga. 2000) (stating "there are persuasive arguments that the 1996 Act present a limited remedial scheme . . . and that the Congress therefore did not intend *Young* to apply against the individual members of the state commissions"), *rev'd on other grounds*, Nos. 00-12809 and 00-12810, 2002 U.S. App. LEXIS 373 (11th Cir. Jan. 10, 2002).

122. *Cf. Bauerly, supra* note 7, at 411-13 (concluding that states have not waived immunity under TCA); Mitchell F. Crusto, *The Supreme Court's "New" Federalism: An Anti-Rights Agenda?*, 16 GA. ST. U. L. REV. 517, 521 (discussing the current majority's "pro-state orientation" regarding federalist issues); Melcher, *supra* note 7, at 78 (arguing that states have not waived immunity under the TCA).

123. *See College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687

Although the Court will probably hold that immunity has not been waived by the states, it could find that *Ex parte Young* allows a party to seek prospective relief against individual commissioners. However, this is also a debatable issue. The Court could instead decide that *Seminole Tribe* precludes relief because Congress provided a limited remedial scheme in the TCA.¹²⁴ Additionally, the Court could apply *Coeur d'Alene* to hold that, for policy reasons, *Ex parte Young* should not apply to allow suits under the TCA.

A. Is Constructive Waiver a Valid Doctrine in the Wake of College Savings Bank?

The initial problem with the Tenth Circuit's decision is the court's assumption that the doctrine of constructive waiver survived *College Savings Bank*. The court's holding relies primarily on its interpretation of *College Savings Bank* as restricting, but not eliminating, constructive waiver.¹²⁵ In construing *College Savings Bank* as "overruling the constructive waiver doctrine . . . but recognizing that a state may still constructively or impliedly waive its immunity in certain circumstances,"¹²⁶ the court relied on *In re Innes*,¹²⁷ an earlier Tenth Circuit opinion.

In *Innes*, Kansas State University attempted to claim immunity from a bankruptcy proceeding initiated by two former students. These former students sought to have their student loans discharged on the basis of undue hardship.¹²⁸ On appeal, the Tenth Circuit noted that although Kansas had waived immunity from suits in state court, such a statute was insufficient to subject it to actions in federal court.¹²⁹ The court also acknowledged that "several Supreme Court decisions provide that neither receipt of federal funds, participation in a federal program, nor an agreement to recognize and abide by federal laws . . . is alone sufficient to waive Eleventh Amendment immunity."¹³⁰

In spite of this authority, however, the court determined that a state may, by its conduct, constructively waive immunity.¹³¹ The court in *Innes* drew a distinction between acceptance of conditioned funds, which can operate as a constructive waiver, and participation in commercial activity that is otherwise lawful, which

(1999) (recognizing that a gift may be transformed into a sanction or compulsion); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985) (holding that the "mere receipt" of funds does not constitute a waiver). *But see* *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 381 (1999) (noting that in passing the TCA, Congress removed a significant area from the states' exclusive control); *Young*, *supra* note 7, at 4 (stating that *AT&T Corp.* interpreted the TCA as "oust[ing] state regulatory authority over local telephone service — a core state regulatory function for the past 100 years").

124. *See Seminole Tribe v. Florida*, 517 U.S. 44, 73-74 (1996).

125. *See MCI Telecomm. Corp. v. Pub. Serv. Comm'n.*, 216 F.3d 929, 935-36 (10th Cir. 2000).

126. *Id.* at 935-36 (citing *In re Innes*, 184 F.3d 1275 (10th Cir. 1999)).

127. 184 F.3d 1275 (10th Cir. 1999).

128. *Id.* at 1277.

129. *Id.* at 1279 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985), to hold that a general waiver of sovereign immunity may subject a state to suits in state court but not in federal court).

130. *Id.*

131. *Id.* at 1280.

cannot constitute a valid waiver.¹³² The court characterized Kansas's conduct as "closely analogous" to the acceptance of conditional funds.¹³³

Following its discussion of the viability of the constructive waiver doctrine, the Tenth Circuit found that the State's contract with the U.S. Department of Education "explicitly provide[d]" that the State would be subject to federal bankruptcy proceedings. Thus, the court's discussion of constructive waiver in *Innes* is arguably dicta.¹³⁴

In recognizing constructive waiver as a viable doctrine, the Tenth Circuit may have felt bound by dicta in *Innes* recognizing the viability of the doctrine. However, because this recognition was merely dicta, the court should have reconsidered the validity of constructive waiver in *MCI Telecommunications*, a case in which waiver was a pivotal issue. Notably, the Supreme Court would not feel bound by such precedent and may find, as other courts have found, that the doctrine is no longer valid after *College Savings*.

Even assuming constructive waiver continues as a valid method of consent to suit, the factual distinctions between *MCI Telecommunications* and *Innes* should have precluded the Tenth Circuit from applying *Innes* to find that Utah constructively waived its immunity. In *Innes*, Kansas State University entered into a contract that explicitly required the university to perform certain functions in any bankruptcy proceeding that arose.¹³⁵ Additionally, unlike the state commission in *MCI Telecommunications*, the university was participating in a new program, not continuing regulation of an area it had regulated extensively for more than one hundred years.¹³⁶

B. Even if the Constructive Waiver Doctrine Is Valid, Does It Require a Finding of Waiver?

At least two other flaws plague the court's finding of constructive waiver in *MCI Telecommunications*. First, it is unclear whether Congress expressly conditioned participation in the TCA regulatory scheme on waiver of immunity because, at the time it enacted the TCA, Congress could have reasonably believed that it could abrogate immunity.¹³⁷ Second, the Tenth Circuit did not sufficiently address

132. See *id.* at 1281 (citing *Parden v. Terminal Ry.*, 377 U.S. 184 (1963)).

133. *Id.* at 1281-82.

134. See *id.*

135. *Id.* at 1282-83. The contract in *Innes* provided,

The institution understands and agrees that it is subject to the program statutes and implementing regulations for each [program established under Title IV of the Higher Education Act of 1965 (HEA)] in which it participates, as well as the general provisions set forth in Part F and Part G of Title IV of the HEA and the Student Assistance General Provisions regulations set forth in 34 C.F.R. [§] 668. The institution also agrees to comply with all the relevant program statutes and regulations governing the operations of each Title IV, HEA program in which it participates.

Id. at 1281 n.3 (alterations in original). The court further noted that the statute required the State to follow certain procedures if a bankruptcy suit was filed. *Id.* at 1282.

136. See Bauerly, *supra* note 7, at 413.

137. See *id.* (stating "it is illogical to read the [TCA] as a manifestation of Congress's intent to

whether the ability to regulate the local market pursuant to federal rules and guidelines truly operates as a gift or as a threatened sanction.¹³⁸

At the time Congress passed the TCA, Supreme Court case law indicated that abrogation of sovereign immunity could be accomplished pursuant to a valid exercise of Congress's Article I powers.¹³⁹ The Supreme Court rebuffed this concept in *Seminole Tribe*, holding that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."¹⁴⁰ However, the Supreme Court decided *Seminole Tribe* after the passage of the TCA. Therefore, an assumption that Congress conditioned state participation in the TCA's regulatory scheme on a waiver of sovereign immunity fails to consider that Congress did not know such a waiver was necessary when it passed the TCA.¹⁴¹ One should not simply assume that Congress expressly conditioned participation on waiver.¹⁴² One also should not assume that Congress expressed a clear intent to condition state regulation on a waiver of sovereign immunity.¹⁴³ Congress might have intended to abrogate immunity, but attempted abrogation does not clearly indicate that Congress expected states to waive immunity *in exchange for* the ability to regulate under the TCA or that Congress intended to preclude a state from regulating if it refused to waive its immunity.¹⁴⁴

The Tenth Circuit in *MCI Telecommunications* recognized that the size of a purported gift might transform it into a threatened sanction.¹⁴⁵ However, the court did not discuss whether the opportunity to regulate local markets pursuant to the TCA was of such a substantial magnitude as to render it a threatened sanction and not a gift or gratuity. Some courts have considered this factor and determined that

condition state commission participation on state consent to suit" because Congress had "good reason" to believe it could abrogate immunity when it passed the TCA). Some courts have also held that the statute did not manifest a clear intent to abrogate immunity. See *Bell Atl.-Del., Inc. v. McMahon*, 80 F. Supp. 2d 218, 230 (D. Del. 2000) (holding Congress did not clearly express an intent to abrogate immunity because it made participation in TCA regulation wholly voluntary by allowing the FCC to preempt a commission's jurisdiction). However, similar language in *Seminole Tribe* providing for suit in federal court was held sufficient to manifest an intent to abrogate. *Seminole Tribe v. Florida*, 517 U.S. 44, 56-57 (1996).

138. The court noted that the line between a gift and sanction could disappear if Congress threatened to withhold something large enough, but, without much analysis, it held that § 252 removed "only a slice of regulatory authority from [the] state[s]." *MCI Telecomm. Corp. v. Pub. Serv. Comm'n*, 216 F.3d 929, 937, 938 n.9 (10th Cir. 2000). Additionally, the court did not discuss whether the states' history of regulation and the public's reliance on that regulation might render participation involuntary.

139. See *Bauerly*, *supra* note 7, at 413.

140. *Seminole Tribe*, 517 U.S. at 72-73; see also *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).

141. See *Seminole Tribe*, 517 U.S. at 72-73.

142. Cf. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

143. Cf. *College Sav. Bank*, 527 U.S. at 682-88 (indicating that the clarity of Congress's intent to condition participation on waiver is critical to determining the voluntariness of waiver, not to determining whether Congress intended a state to waive immunity).

144. See *id.* (noting that abrogation and constructive waiver are "the same side of the same coin").

145. See *MCI Telecomm. Corp. v. Pub. Serv. Comm'n*, 216 F.3d 929, 937 (10th Cir. 2000).

states do not voluntarily waive immunity by participating in the scheme of the TCA.¹⁴⁶

The longstanding history of state regulation in this area and the public importance of that regulation also support the conclusion that the purported gift is a threat of sanction. For more than one hundred years, states have regulated local telecommunications markets.¹⁴⁷ In fact, Congress was taking advantage of state expertise in such regulation when it included the possibility of state regulation in the TCA.¹⁴⁸ Because continued state regulation of this area is so important to the public and because states have regulated local telecommunications markets for so long, conditioning states' ability to continue regulating on a waiver of sovereign immunity, even if such a condition were clear, could render the waiver involuntary.¹⁴⁹

As previously noted, the Tenth Circuit recognized that a gift could become a threatened sanction if it were too large.¹⁵⁰ However, the court did not consider whether such a transformation had taken place under the TCA. This lack of consideration renders the decision incomplete at best and puts its conclusion in question.

C. Does *Ex Parte Young* Really Allow Suits Under the TCA?

An additional flaw in the Tenth Circuit decision is the disproportionately brief analysis afforded to the application of *Ex parte Young*. The brevity of the court's reasoning in its application of *Ex parte Young* is especially disturbing in light of the questionable viability of the constructive waiver doctrine¹⁵¹ on which the remaining

146. *Bellsouth Telecomm., Inc. v. MCImetro Access*, 97 F. Supp. 2d 1363, 1372 (N.D. Ga. 2000), *rev'd on other grounds*, Nos. 00-12809 and 00-12810, 2002 U.S. App. LEXIS 373 (11th Cir. Jan. 10, 2002); *AT&T Communications of S. Cent. States, Inc. v. Bellsouth Telecomm., Inc.*, 43 F. Supp. 2d 593, 601-602 (M.D. La. 1999).

147. *Young*, *supra* note 7, at 4.

148. *See Prepared Testimony of James D. Ellis: Senior Executive Vice President and General Counsel: SBC Communications Inc.: Before the Senate Judiciary Committee*, FED. NEWS SERV., Sept. 11, 1996, LEXIS, FEDNEWS Database, also available at 1996 WL 10830691 (stating that "in recognition of the fact that regulation of local exchange telephony has historically been . . . under the control of the state public service commission, Congress gave the states a significant role" in regulation under the TCA); *Prepared Testimony of the Honorable Julia L. Johnson: Commissioner, Florida Public Service Commission: Chair, Federal Legislation and Regulation Subcommittee of the National Association of Regulatory Utility Commissioners — NARUC: Committee on Communications Commissioner, 254 Universal Service Joint Board Before the Senate Committee on Commerce, Science and Transportation on Implementing the Telecommunications Act of 1996*, FED. NEWS SERV., June 18, 1996, LEXIS, FEDNEWS Database, also available at 1996 WL 10165037 (noting "Congress's decision [in the TCA] to leave direct oversight of the states' markets to the states was the most expedient means of assuring the development of genuine local exchange competition").

149. *See Bellsouth Telecomm.*, 97 F. Supp. 2d at 1372; *AT&T Communications of S. Cent. States*, 43 F. Supp. 2d at 601-602.

150. *See MCI Telecomm.*, 216 F.3d at 937; *see also supra* notes 145-46 and accompanying text (discussing the argument that a "gift" can be too large and therefore coercive and collecting cases).

151. *See Rutherford, supra* note 76, at 589-90 (noting the Court's hostility to the constructive waiver doctrine prior to *Seminole Tribe*).

analysis relies. The primary problem with the court's application of *Ex parte Young* is its failure to consider whether the remedial scheme provided by the TCA forecloses the application of *Ex parte Young* under *Seminole Tribe*.¹⁵² The second problem is that the court did not sufficiently examine, as required by *Coeur d'Alene Tribe*, whether the relief provided by *Ex parte Young* would otherwise be prohibited because of immunity and because it "implicates special sovereign interests."¹⁵³

1. The Ex parte Young Doctrine Does Not Apply to Allow Suits Against Individual State Commissioners Because the TCA Contains a Detailed Remedial Scheme

The Tenth Circuit did not even attempt to discuss the characteristics of the state interests involved, but summarily stated that relief against the individual commissioners would not infringe on any sovereign interest.¹⁵⁴ This lack of analysis is even more troubling because the remedial scheme provided by the TCA is arguably detailed enough that, under *Seminole Tribe*, it precludes the application of *Ex parte Young*.¹⁵⁵

In *Seminole Tribe*, the Court refused to apply the *Ex parte Young* doctrine because Congress provided specific remedies under the IGRA.¹⁵⁶ Unfortunately, the Court did not indicate the level of specificity necessary to preclude the availability of *Ex parte Young* relief.¹⁵⁷ Some courts have held that the TCA's remedial scheme is intricate and detailed enough to bar the application of *Ex parte Young*.¹⁵⁸ However, most of the circuit courts that have considered the issue have distinguished *Seminole Tribe*. These courts have held that *Ex parte Young* applies to allow suits against officials under the TCA because the remedial scheme in *Seminole Tribe* was far more detailed and functioned as a stricter limitation on the available remedies than the scheme provided by the TCA.¹⁵⁹

152. See *Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996) (stating that "where Congress has prescribed a detailed remedial scheme for the enforcement [of a particular federal right], a court should hesitate before casting aside those limitations and permitting an action against a state officer").

153. *MCI Telecomm.*, 216 F.3d at 940 n.8.

154. *Id.*

155. See *Bellsouth Telecomm., Inc. v. MCImetro Access*, 97 F. Supp. 2d 1363, 1373 (N.D. Ga. 2000), *rev'd on other grounds*, Nos. 00-12809 and 00-12810, 2002 U.S. App. LEXIS 373 (11th Cir. Jan. 10, 2002); *AT&T Communications of S. Cent. States v. Bellsouth Telecomm., Inc.*, 43 F. Supp. 2d 593, 602 (M.D. La. 1999); *Bell Atl.-Md., Inc. v. MFS Intelenet of Md., Inc.*, No. S99-2061, 1999 U.S. Dist. LEXIS 16477, at *19 (D. Md. Oct. 20, 1999); Bauerly, *supra* note 7, at 409-10.

156. *Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996).

157. See Erwin Chemerinsky, *Ability to Sue State Government Narrowed*, TRIAL, Dec. 1999, at 72, 73; see also Am. Bar Ass'n, *Case Law Development: Access Issues*, 24 MENTAL & PHYSICAL DISABILITY L. RPTR. 194, 199 (2000).

158. See *Bellsouth Telecomm., Inc.*, 97 F. Supp. 2d at 1373; *AT&T Communications of S. Cent. States, Inc.*, 43 F. Supp. 2d at 602; *Bell Atl.-Md., Inc.*, 1999 U.S. Dist. LEXIS 16477, at *19.

159. *AT&T Communications v. Bellsouth Telecomm. Inc.*, 238 F.3d 636 (5th Cir. 2001) (holding *Ex parte Young* allows suits against individual commissioners under the TCA); *GTE N., Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000); *MCI Telecomm. Corp. v. Ill. Tel. Co.*, 222 F.3d 323, 328 (7th Cir. 2000); *MCI Telecomm. Corp. v. Pub. Serv. Comm'n*, 216 F.3d 929, 938-39 (10th Cir. 2000).

The IGRA, at issue in *Seminole Tribe*, imposed a duty on states to negotiate in good faith with Indian tribes and attempted to provide judicial enforcement of this good-faith obligation.¹⁶⁰ The statute restricted the available remedy to a federal court order directing the parties to arrive at an agreement within a specified time.¹⁶¹ Additionally, the statute provided that the only possible sanction for violating the court order was mandatory mediation.¹⁶² If the mediation failed to produce an agreement, the Secretary of the Interior would create regulations.¹⁶³ The Court in *Seminole Tribe* held that this limit on the remedies and judicial review available under the IGRA precluded the availability of remedies under *Ex parte Young*.¹⁶⁴ The Court reasoned that if *Ex parte Young* applied, states would be subject to remedies other than those intended by Congress.¹⁶⁵

Clearly, the scheme in the IGRA is more complex than that in the TCA. However, "there are persuasive arguments that the [TCA] presents a limited remedial scheme" by constraining the scope of judicial review and providing specific remedies that do not include prospective relief.¹⁶⁶ First, the TCA allows specific methods of obtaining relief. For instance, Congress provided parties with the ability to petition a state commission for arbitration and mediation of interconnection agreements.¹⁶⁷ Congress further specified timetables by which the commission must adopt agreements and allowed the FCC to preempt a state commission's jurisdiction only if the commission failed to act within those time constraints.¹⁶⁸ Second, the scope of review available under the TCA may be limited. Some courts have held that Congress limited federal court review to a commission's approval or rejection of interconnection agreements.¹⁶⁹ Courts have also held that such review is limited to questions of compliance with specific sections of the TCA and does not include questions of compliance with state law.¹⁷⁰ Finally, the act arguably limits remedies to actions against the state, not the commission, thus evidencing an intent that *Ex parte Young* remedies should not be available.

The Supreme Court could certainly decide that the remedial scheme in the TCA is complex enough to preclude suits under *Ex parte Young*. Additionally, considering the Court's recent cases upholding state immunity and thwarting congressional efforts

160. *Seminole Tribe*, 517 U.S. at 74; see also 25 U.S.C. § 2710(d)(7) (1994).

161. 25 U.S.C. § 2710(d)(7) (1994).

162. *Seminole Tribe*, 517 U.S. at 74.

163. *Id.* at 74-75.

164. *Id.* at 75.

165. *Id.*

166. *Bellsouth Telecomm., Inc. v. MCI Metro Access*, 97 F. Supp. 2d 1363, 1373 (N.D. Ga. 2000); see also Bauerly, *supra* note 7, at 409-10.

167. 47 U.S.C. § 252(b) (1994).

168. *Id.*

169. *Cf. Southwestern Bell Tel. Co. v. Pub. Util. Comm'n*, 208 F.3d 475, 479, 481 (5th Cir. 2000) (refusing to interpret § 252(e)(6) as limiting the jurisdiction of federal courts to decisions approving or rejecting agreements but recognizing a circuit split).

170. See *id.* at 481 (recognizing a circuit split on the issue of whether federal courts are authorized to review a state commission's compliance with state law).

to circumvent that immunity without an express waiver, the Court may find the scheme so complex as to foreclose the availability of *Ex parte Young* suits.

2. The Relief Requested Against the State Commissioners May Implicate Special Sovereign Interests

The second flaw in the Tenth Circuit's disposition of the *Ex parte Young* issue is its failure to thoroughly examine the state interests implicated by suits under the TCA. The Tenth Circuit, in *J.B. ex rel. Hart v. Valdez*,¹⁷¹ recognized that *Coeur d'Alene Tribe* requires courts to consider whether relief against state officials "implicates special sovereignty interests" and is the "functional equivalent" of relief against a state that would otherwise be prohibited by the Eleventh Amendment.¹⁷² Although the court in *MCI Telecommunications* recognized this requirement, it summarily stated that no sovereign interest was violated in awarding relief against the Utah commissioners.¹⁷³ The court did not consider the characteristics of such interests but relegated its discussion to a single footnote.¹⁷⁴ Because of the history of state regulation of this area and the local character of intrastate telecommunications markets, this question should be properly analyzed and examined before courts apply *Ex parte Young* to allow suits.¹⁷⁵

The Supreme Court in *Coeur d'Alene Tribe* recognized that where state sovereign interests are implicated and relief under *Ex parte Young* is the functional equivalent to that which the Eleventh Amendment would otherwise prohibit, *Ex parte Young* should not be applied to afford relief.¹⁷⁶ In suits brought under the TCA, the telecommunications company generally seeks review of a commission decision to determine whether it complies with federal law. Similarly, in an *Ex parte Young* suit, the telecommunications company generally seeks equitable relief to prevent a commission from enforcing a decision alleged to violate the TCA.¹⁷⁷ The relief sought against individual commissioners is very similar to, and is the functional equivalent of, that sought against a state. However, because the relief afforded by *Ex parte Young* is almost always very similar to the relief sought against a state itself, the key issue becomes whether the relief impacts "special sovereign interests."¹⁷⁸

The property rights involved in *Coeur d'Alene Tribe* and the regulation of local telecommunications industry are very different. However, it is not obvious or apparent that *Ex parte Young* should apply. As previously indicated, the states have a long history of regulating intrastate telecommunications markets. However, Congress could have regulated the entire field, preventing any state regulation, had

171. 186 F.3d 1280 (10th Cir. 1999).

172. *Id.* at 1286.

173. *MCI Telecomm. Corp. v. Pub. Serv. Comm'n*, 216 F.3d 929, 940 n.8 (10th Cir. 2000).

174. *See id.*

175. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270, 277 (1997) (noting that *Ex parte Young* generally applies if a party seeks prospective relief, based on a federal right, against a state official but stating it should not be interpreted to apply to all such situations).

176. *Id.* at 281-82.

177. *See, e.g., MCI Telecomm.*, 216 F.3d at 939.

178. *Coeur d'Alene Tribe*, 521 U.S. at 281.

it chosen to do so.¹⁷⁹ Additionally, although the Court has previously recognized that "having the power to make decisions and set policy is what gives the state its sovereign nature," it has "upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions."¹⁸⁰ Thus, the Court could decide that because the TCA acts only as a guide and because Congress could preempt the area entirely, suits for prospective relief would not implicate sovereign interests so as to preclude *Ex parte Young* relief. However, to dispose of this issue without analysis underestimates its importance and the unpredictability of its resolution.

V. Conclusion

It is not clear whether the Supreme Court will continue its course of protecting state sovereign immunity. Many commentators and scholars are calling for a halt to the apparently never-ending growth of the doctrine. The fact that each of the Court's most recent decisions, *Seminole Tribe*, *Alden*, and *College Savings Bank*, have been delivered by only a five-Justice majority adds to the uncertainty. This increases the importance of the composition of the Court and makes the resolution of the issue of sovereign immunity under the TCA even more unpredictable.

The Court has not set clear boundaries for its current sovereign immunity doctrine. Therefore, it is difficult to predict the Court's disposition of the issue, even if the Court were to continue its current trend of upholding state immunity. However, the Tenth Circuit clearly failed to address a number of issues and arguments in *MCI Telecommunications*. The viability of the doctrine of constructive waiver is questionable after *Seminole Tribe*, but the court assumed its viability. Even if viable, the doctrine's application to suits brought pursuant to the TCA is another issue that the court did not fully explore. Additionally, the court did not sufficiently address the questions of whether the continued regulation of local telephone markets is truly a "gift" and whether the statute clearly requires waiver for a state to participate in the regulatory scheme. Nor were these questions adequately addressed by many of the other circuits that have decided the issue. Furthermore, the Tenth Circuit's conclusory application of *Ex parte Young* in the face of *Coeur d'Alene Tribe* and *Seminole Tribe* begs the question of whether this exception to immunity can afford relief.

The threat of lawsuits challenging decisions by state commissioners grows as the number of approved agreements increases. Without state immunity, valuable commission resources, including time and money, could be diminished by suits seeking federal review of state commission actions. If the defense of state immunity is available, it could limit potential plaintiffs to review by state courts, and even that review could be dependent upon a state's waiver of immunity in its own courts.

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179. See *FERC v. Mississippi*, 456 U.S. 743, 764 (1982) ("The commerce power permits Congress to preempt the States entirely in the regulation of private utilities."); *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 290-91 (1981).

180. *FERC*, 456 U.S. at 762.